No. 03-931

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT JOE ELTON NIXON

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BRIEF FOR RESPONDENT JOE ELTON NIXON

OPINIONS BELOW*

The decision to be reviewed is reported as *Nixon v. State*, 857 So. 2d 172 (Fla. 2003) [hereafter, "*Nixon III*"]. An earlier decision of the Florida Supreme Court in this same postconviction proceeding is reported as *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000) [hereafter, "*Nixon II*"]. That is the decision in which the Florida Supreme Court addressed the legal issues raised in the instant petition for *certiorari*. (In *Nixon III* the Florida Supreme Court simply applied the law established in *Nixon II* to the factual record made on remand at an evidentiary hearing ordered by *Nixon II*.) The decision of the Florida Supreme Court affirming the first-degree murder conviction and death sentence of respondent Joe Elton Nixon on direct appeal is reported as *Nixon v. State*, 572 So. 2d 1336 (Fla. 1991) [hereafter, "*Nixon I*"].

JURISDICTION

The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the Sixth and Fourteenth Amendments, reading in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

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* Citations to the record are as follows: "JA." designates the Joint Appendix in this Court. "R." designates the 12 volumes of the original record in the Florida Supreme Court below, numbered pages 1 to 2104. "3.850 R." designates the 23 volumes of the postconviction record in the Florida Supreme Court below, numbered pages 1 to 4393. "FA." designates an Appendix submitted by Nixon in the Florida Supreme Court below.

jury . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S. CONST. amend. VI.)

"No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ." (U.S. CONST. amend. XIV, § 1.)

STATEMENT OF THE CASE

1. The crime, according to the prosecution's uncontested evidence

The opinion of the Florida Supreme Court on Mr. Nixon's direct appeal describes the circumstances of the crime as they were made to appear by the prosecution's evidence at trial, which was not contested by Nixon's trial counsel:

> "On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County. The next morning Ms. Bickner's car, the interior and trunk of which had been gutted by fire, was found in a Tallahassee drainage ditch. The same day, after receiving information from Joe Elton Nixon's girlfriend, Wanda Robinson, and brother, John Nixon, that he had admitted the killing, had been driving the victim's car prior to burning it, and had pawned two of her rings, Tallahassee police arrested Nixon. Nixon was charged with first-degree murder, kidnapping, robbery, and arson.
>
> "At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.
>
> "After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded

area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death." (*Nixon I*, 572 So. 2d at 1337-38 [footnote omitted].)

2. The trial *in absentia*

Nixon was indicted for first-degree murder and associated offenses. In the week before trial,

> "Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hearing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense

> counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, 'I still [sic] run my mouth and speak when I get ready unless you tape it up.' Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision 'to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial.' When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him." (*Nixon I*, 572 So. 2d at 1341.)[1]

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[1] The portions of the hearing in the holding cell that deal with Nixon's reasons for absenting himself from the trial are as follows:

"THE COURT: . . . Your attorney Mr. Corin and other folks have told me that you don't want to go into the courtroom.

(*footnote continued*)

The remainder of Nixon's jury trial upon his plea of not guilty was conducted *in absentia* except for a brief period not presently relevant.

"MR. NIXON: Correct.
"THE COURT: Could you tell me why?
"MR. NIXON: I want another attorney.
"THE COURT: Well, I don't think I'm going to do that. Have you got any other reasons you don't want to go in?
"MR. NIXON: Well, I ain't got no business in there.
"THE COURT: Well, you're the one that's on trial, and we're in to the second day. And yesterday, we got several of the jurors, if not selected, at least eligible to be selected. And you were there at that time. You seemed to be doing well. What happened?
"MR. NIXON: That's personal.
"THE COURT: Sir?
"MR. NIXON: That's personal. Y'all go ahead and have your trial if you want, but leave me out of it. You can sentence me, hang me, do what you want, but leave me out of it. If you don't give me no other lawyer. I ain't got no rap, none of me. Take me back to the jail and have Court without me. I don't care.
". . . . .
"THE COURT: . . . What I need to know is are you going to come in and behave or not?
"MR. NIXON: I want to go to the jail house.
"THE COURT: You want to go to the jail house?.
"MR. NIXON: Yes.
"THE COURT: You realize that if you do that, you are not going to be there while your trial is taking place?
"MR. NIXON: I ain't got no lawyer.
"THE COURT: Well, you have one of the best I've run across. I still need to know whether you will come in there. You want to go to the jail house or you want to go in the courtroom?
"MR. NIXON: I want to go to the jail house right now.
"THE COURT: You realize that if you do that, you are giving up your right to be present when your case is taking place?
"MR. NIXON: I don't care nothing about that case. Never did care nothing about it.
"THE COURT: It's your life that's involved. You don't care about that?
"MR. NIXON: I care enough about my life just as much as you care about it.
"THE COURT: Don't you want to protect it?
"MR. NIXON: Do you want to protect it?

(footnote continued)

3. Defense counsel tells the jury Nixon is guilty beyond a reasonable doubt of every element of a horrible first-degree murder

As the Florida Supreme Court subsequently related, Nixon's court-appointed lawyer, Michael Corin,

> "made the following remarks during his opening statement in the guilt phase:
>
> > "In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
> >
> > "In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.
>
> ". . . During his closing argument, Nixon's counsel said:
>
> > "Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very unique-

"THE COURT: Yes, sir. That's part of my job.
"MR. NIXON: You don't want to protect it. So, you see, I don't want to hear that. I care just as much as you rednecks care about myself. You don't give a damn just like I don't. That's the bottom line." (R. 335–38.)

ly tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." (*Nixon II*, 758 So. 2d at 620.)[2]

4. Conviction, and an indecisive appeal

The jury convicted Nixon of each of the crimes itemized in counsel's argument and he was sentenced to death after a sentencing proceeding at which both sides presented evidence. On direct appeal, he contended that counsel's concessions of guilt in argument "were the functional equivalent of a guilty plea, requiring a record

[2] Defense counsel conducted almost no cross-examination during the prosecution's case—asking only a few desultory questions apparently aimed at clarifying statements made on direct by a few of the State's 35 witnesses and waiving cross-examination of the rest. (*See* the analysis presented in Claim V.L ["Trial Counsel did not Impeach or Cross-Examine any of the State Witnesses"] of Nixon's Motion to Vacate Judgment of Conviction and Sentence of Death filed October 7, 1993 at 3.850 R. 500–12, a portion of Nixon's *Strickland* claim that was not reached by the Florida Supreme Court below.) After the prosecution rested, defense counsel rested without presenting any evidence or making any motions.

inquiry as to whether he knowingly and voluntarily consented to this strategy." *Nixon I*, 572 So. 2d at 1339. The Florida Supreme Court found itself unable to resolve this contention (despite a remand for an evidentiary hearing and follow-up instructions to the trial court), *see Nixon I*, 572 So. 2d at 1339–40, and it "decline[d] to dispose of . . . [the issue on a] record which we view as less than complete," leaving Nixon to "raise the issue in a later motion to vacate pursuant to Florida [postconviction procedure]." *Id.* at 1340.

5. Postconviction proceedings

Nixon accordingly raised the issue again in a state postconviction Motion to Vacate Judgment of Conviction and Sentence of Death filed on October 7, 1993 [hereafter, "Motion to Vacate"]. As we describe more fully in footnote 44 below, he pleaded his federal constitutional claims regarding trial counsel's concessions of guilt in the alternative, as a violation of his rights to counsel and to a Due Process trial on his plea of not guilty (under *United States v. Cronic*, 466 U.S. 648 (1984), and *Boykin v. Alabama*, 395 U.S. 238 (1969)) and as one of numerous counts of ineffective assistance of counsel (under *Strickland v. Washington*, 466 U.S. 668 (1984)). He sought an evidentiary hearing on the *Strickland* claim[3] and argued, again in the alternative, that the *Cronic-Boykin* claim could be decided in his favor either with or without taking evidence.[4] The state postconviction judge denied Nixon's motion without an evidentiary hearing on any of his claims, JA. 378–92, and Nixon appealed to the Florida Supreme Court, reiterating all of the arguments he had made in the Motion to Vacate. On that appeal, the Florida Supreme Court upheld his *Cronic-Boykin* claim in an opinion described at

[3] Motion to Vacate at 3.850 R. 465 and 517.

[4] Motion to Vacate at 3.850 R. 455–56.

page 25 and in footnote 43 below, which decided all of the substantive legal issues now before this Court. *Nixon II*, 758 So. 2d at 621–25. The crux of that opinion was that "the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial." *Id.* at 624. The Florida Supreme Court accordingly "remand[ed] . . . for an evidentiary hearing on this issue," *ibid.*, while declining to address any of the other issues on the appeal, including Nixon's *Strickland* claim. *See Nixon III*, 857 So. 2d at 175 n.5.

On remand, a state circuit judge conducted the hearing. The result, as summarized by the Florida Supreme Court below, was that:

> "On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy.
>
> "Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?
>
> "A: [Corin] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.
>
> "Q: And how did he respond?
>
> "A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased.[5] And I think I answered that before also.

[5] It is unclear whether this refers to an episode that is partly reflected in the transcript of proceedings of July 19, 1985, and elaborated in a newspaper report set out in the postconviction Motion to Vacate. July 19th was the day after Nixon's trial counsel conceded his guilt in opening argument to the jury. The transcript indicates that on the morning of the 19th, Nixon had been brought from jail to the courthouse for a possible return to the courtroom. R. 1990. (There had been some indication from Nixon to the court the preceding afternoon that Nixon was willing to resume attendance at the trial. *See* R. 1992).

> "Q: Now what do you mean by he did nothing?

But before the morning session of the 19th began, defense counsel Corin reported to the judge that Nixon had just informed Corin "that he would rather go back to the jail." R. 1990. The judge asked Corin "What seems to be the nature of his problem?" and Corin—who said that he had had "discussions with him [Nixon] over the last 22 minutes"—replied "I think what occurred yesterday." *Ibid.* The court then took testimony for the record from an officer of the Sheriff's Department, Howard Schleich, who had dealt with Nixon in the holding cell. Schleich testified that:

> "When the indication came to bring the Defendant into the courtroom, we went to the cell to bring him in. He advised at that time that he did not want to come in, he wasn't leaving his cell, that he had read the paper and that it had indicated in there that he was guilty." (R. 1992).

Schleich described Nixon as "somewhat agitated," "standing on the bench that is a seat in the holding cell," "talking loud" (R. 1994), "using profanity," and "fairly vehement that he does not . . . want to come out of the holding cell to come into the courtroom" (R. 1995). During Schleich's testimony, the judge observed that "since coming on the bench I guess in the last five or six minutes . . . , I have heard in the courtroom itself a loud voice, apparently under some volume." R. 1993. He inquired "whether that is Mr. Nixon I am hearing in the courtroom" and was informed by officer Schleich that it was. *Ibid.* By this point, the judge as well as defense counsel plainly understood that counsel's concession of Nixon's guilt was contrary to Nixon's wishes and would be vigorously denounced by Nixon; indeed, the judge reaffirmed his previous ruling that Nixon's trial could proceed in absentia for that very reason:

> "THE COURT: All right. Based on the evidence that I have heard this morning, I'm going to remain of my prior ruling that Mr. Nixon has voluntarily, intelligently and knowledgeably waived his right to attend trial based on the description of his attitude, his present behavior, my apprehension that, should he come into the courtroom, that what would take place would be detrimental to his best interests in this trial. *I am aware, in view of Defense counsel's opening statement yesterday, seeks to place the main emphasis on behalf of his client in the penalty phase of this case and that to compel the attendance of Mr. Nixon at this time would be detrimental to Mr. Nixon's best interest as Defense counsel has mapped out the strategy for his client's best interest.* There-

"A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

"Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt.[6] . . .

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fore, I would authorize his return back to Leon County Jail." (R. 1995; emphasis added).

The newspaper account, from the *Tallahassee Democrat* of July 20, 1985, is headlined *"Accused killer boycotts trial after hearing about lawyer's statement of guilt"* and reads:

"Finally, Joe Elton Nixon decided to show up for the fifth day of his first-degree-murder trial. But before it was time to step from the holding cell into the courtroom Friday morning, his lawyer handed him the newspaper.

"What Nixon read on the front page of the Democrat sent him cussing and ranting and back to boycotting his trial.

"He read the unique opening statements by Assistant Public Defender Michael Corin: 'In this case, there won't be any question—none whatsoever—that my client caused Jeanne Bickner's death.'

". . . .

"Friday morning, Nixon's loud ranting could be heard by courtroom spectators who waited for the judge to begin the second day of testimony.

"Leon County Sheriff's Deputy Howard Schleich was close by, when Nixon stood on a bench in the holding cell spewing out angry words.

"'He was using profanity and was very vehement in his refusal to go in the courtroom,' said Schleich. 'He wasn't going to go, after reading in the paper that his lawyer said he was guilty.'" (3.850 R. 457 n.12.)

[6] "Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy." *Nixon III*, 857 So. 2d at 176 n.8.

". . . the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." (*Nixon III*, 857 So. 2d at 175–76.)

Nixon again appealed, and the Florida Supreme Court, finding "no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy," held that he was entitled to a new trial under its ruling in *Nixon II*. *See Nixon III*, 857 So. 2d at 176 (emphasis added).

6. Questions about the crime not asked until the postconviction stage

Unsurprisingly in a litigation in which the prosecution's theory of the case went unchallenged, Nixon's postconviction pleadings raise questions that the trial record does not satisfactorily answer.

Substantial physical evidence connected Joe Elton Nixon to property of the victim, Jeanne Bickner, taken from her at the time of her murder. He was later seen driving her car. His palm print was on the trunk lid of the car. He pawned some of her jewelry. But this is equally consistent with his involvement in disposing of the proceeds of the robbery as with his involvement in the robbery-murder itself. Plainly, and as the Florida Supreme Court's direct-appeal opinion (pages 2–4 above) relates, the most persuasive evidence that Joe Elton Nixon actually murdered Jeanne Bickner—and that he did so in the manner called for by the prosecution's theory of the case—was:

(A) Joe Elton Nixon's detailed confession;
(B) testimony by his brother John Nixon and by a sometimes girlfriend of Joe's and John's, Wanda Robinson, that Joe Elton Nixon confessed the killing and made other damaging statements to them; and
(C) their description of other incriminatory activity on his part.

The disturbing problems here are that (A) numerous important and unimportant details in Joe Elton Nixon's confession are implausible and inconsistent with the physical facts of the crime; (B) his confession and the stories told by John Nixon and Wanda Robinson are also inconsistent—or waver in and out of alignment as the latter two stories evolve; and (C) there is strong reason to believe that John Nixon was far more deeply involved in the killing of Jeanne Bickner than he or Wanda let on.

- Joe's confession says that he encountered the victim in the parking lot of the Governor's Square Mall and took her to the place where he killed her on a Saturday afternoon. Confession of Joe Elton Nixon, August 14, 1984, Exhibit A of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Confession"] at 3.850 R. 918–19, 920, 953–54. In fact, the abduction and killing occurred on a Sunday.[7] John Nixon and Wanda Robinson initially corroborated Joe's Saturday version[8] but later switched to Sunday.[9]

[7] Bickner was seen alive by at least two witnesses on Sunday, August 12, 1984. *See* the trial testimony of Mary Atteberry, R. 1867–68, and of Linda Gallagher, R. 1871.

[8] *See* Joint Statement of John D. Nixon and Wanda Robinson, given August 14, 1984, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Joint Statement"] at 3.850 R. 969–71, 974.

(*Footnote 9 appears on the following page*)

- Joe's confession says that in the mall parking lot he told Ms. Bickner that he had a broken muffler on his uncle's Chevrolet Monte Carlo and had hurt his arm, Confession at 3.850 R. 919–20; Ms. Bickner offered him a ride and they left the mall in Bickner's 1973 M.G. two-seat, convertible, with Bickner driving voluntarily and Nixon in the front passenger seat. Confession at 3.850 R. 921, 922, 924. At some point on the road, Nixon says he hit Bickner on the head, overpowered her and—from the passenger side of the car—grabbed the steering wheel and maneuvered the M.G. safely over to the side of the road. He then got the still-conscious Bickner out of the car and forced her into the trunk. Confession at 3.850 R. 924–27.
  - John Nixon and Wanda Robinson both stated that Joe Nixon had told them that he put Bickner in the trunk of the Monte Carlo, not the M.G., in the parking lot of the Governor's Square Mall.[10] John said

[9] Statement of John D. Nixon, given August 16, 1984, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "John Nixon Statement"] at 3.850 R. 1016–17; Deposition of Wanda Robinson, taken February 14, 1985, Exhibit C of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Robinson Deposition"] at 3.850 R. 1120. John Nixon testified on deposition that, in admitting the killing to John, Joe had never told John what day it occurred. Deposition of John Nixon, taken February 14, 1985, Exhibit B of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "John Nixon Deposition"] at 3.850 R. 1045.

[10] *E.g.*, John Nixon Statement at 3.850 R. 1007, 1009, 1018; John Nixon Deposition at 3.850 R. 1037; Statement of Wanda Robinson, given August 16, 1984, Exhibit C of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 [hereafter, "Robinson Statement"] at 3.850 R. 1073; Robinson Deposition at 3.850 R. 1120. In stark contrast to Joe's confession specifying the M.G., John said that Joe had specified the Monte Carlo:

"Q: [T]ell us what he told you [of how the crime happened].

Joe told him that after killing Bickner, he returned to the Mall, parked the Monte Carlo, and then drove back out to the crime scene in the M.G.[11] Wanda said Joe told her that after putting Bickner in the trunk of the Monte Carlo, Joe drove out to Wanda's mother's house with Bickner in the trunk.[12]

- The trunk of a 1973 M.G. is so small that, in order to fit a person into it, the spare tire would have to be removed.[13] This would have required Nixon (if

"A: I will tell you exactly what he told me. He told me that . . . out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo . . . The lady gave him a boost off and everything and he abducted her and threw her in the trunk of his car.

"Q: The trunk of his car?

"A: Uh huh. (John Nixon Statement at 3.850 R. 1007.)

See also id. at 3.850 R. 1018; Joint Statement at 3.850 R. 976; Robinson Deposition at 3.850 R. 1119–20; Robinson Statement at 3.850 R. 1072. John originally said the same thing in his deposition:

"Q: Put her in the trunk of what car?

"A: In the green and white car.

"Q: Your Uncle Tom's Monte Carlo?

"A: Uh huh." (John Nixon Deposition at 3.850 R. 1037.)

Later, he wobbled on the point. *See infra* note 13.

[11] John Nixon Statement at 3.850 R. 1009. Joe's confession tells the story the other way around: after killing Ms. Bickner, he returned her car to the mall, where the Monte Carlo was parked. Confession at 3.850 R. 938.

[12] Robinson Statement at 3.850 R. 1073–74; Robinson Deposition at 3.850 R. 1120. Wanda Robinson said that her mother had seen Joe driving the Monte Carlo, not the M.G., past her house while her children played out in front, Robinson Statement at 3.850 R. 1073–1074, and that Joe had told Wanda that Bickner was in the trunk of the car at this time, *id.* at 3.850 R. 1073.

[13] As John Nixon testified on deposition:

"A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just

the scenario in his confession were true) to single-handedly maintain control over Bickner at the roadside while opening the trunk, removing the spare tire, forcing her into a very small space, and then closing the trunk.

- There are additional reasons why the M.G. scenario is dubious. The crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.[14] The 1973 M.G. has only four and a half inches of ground clearance, new and unloaded.[15] Four and a half inches is about two-thirds of the *width* of the printed briefs in this Court. Also, the M.G. is an idiosyncratic car. Pho-

figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that."

"Q. Too small to put a person in?

"A. That's what it seems like. I don't know if you could get somebody in there or not." (John Nixon Deposition at 3.850 R. 1039.)

[14] *See* the trial testimony of William Gunter, R. 1902; Directions in Leon County Sheriff's Office Death Investigation Report, August 24, 1984, Appendix to Defendant's Post-Argument Memorandum on the Scope of the Evidentiary Hearing on Defendant's Post-Conviction Claims, Tab M at 3.850 R. 3392–94. Nixon's confession says he drove the M.G. to a logging road and then over the rutted dirt road to the secluded site where Ms. Bickner's body was found. Confession at 3.850 R. 927–28.

[15] *See* "M.G. Series M.G.B. Specifications," M.G.B. Web Page, http://www.mgcars.org.uk/MGB/ mgbspec.html, Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 12 at FA. 208. Ms. Bickner's car was an "M.G.B." *See* R. 1871. It probably had even less than four and a half inches of ground clearance because it was over ten years old at the time of the crime and would have had wear on the springs and suspension. Nixon's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the ground. Finally, the wheels would likely have slipped into the ruts of the road, bringing the bottom of the car down even lower where the hump rose between the ruts.

tos of the interior of Ms. Bickner's M.G. show a manual transmission in cramped quarters.[16] Joe Nixon could barely drive the M.G. John Nixon said that days after the crime Joe could not get the car into reverse.[17] And Joe was not familiar with the area where body was found.[18]

- The alternative scenario reflected in John Nixon's and Wanda Robinson's statement—that Joe took Ms. Bickner from the mall parking lot by abducting her forcibly in the Monte Carlo—would avoid the difficulties of the M.G. story. But that scenario would require Joe Nixon, a lone black man, to have overpowered Ms. Bickner, a white woman, and forced her into the Monte Carlo's trunk in full view of Sunday afternoon shoppers at the mall. Such a procedure would be far more plausible for two accomplices than for a single actor. We shall see that this sort of abduction was a *modus operandi* that *John* Nixon had previously used alone, but only under less visible conditions.

- Joe Nixon's confession relates that, after having driven Ms. Bickner into a wooded area, he removed her from the trunk of the M.G. and tied her to a tree with two jumper cables from the car. Nixon first said he

16 *See* Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 11 at FA. 201.

17 "He tried to get the car in reverse. He couldn't hardly get it in reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." John Nixon Statement at 3.850 R. 1017–18. *See also* Joint Statement at 3.850 R. 987. Yet Joe's confession appears to say that after killing Ms. Bickner, he left the scene by backing her car out. Confession at 3.850 R. 938.

18 "Q: Are you familiar with Tram Road, . . . Joe? ¶ A: Uh, no. ¶ Q: Okay. You ever been down in there before? ¶ A: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that." Confession at 3.850 R. 927. In contrast, the crime scene was in an area where Wanda Robinson's mother had often gone fishing. *See* Joint Statement at 3.850 R. 976.

tied her feet and left hand, using one cable for the feet and the other cable for her hand. He clarified that there were two separate cables.[19] Later, he said that maybe he did tie her around the waist, and that if he did, he guessed it was with a cable.[20] To support that statement, Nixon changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet.[21] The final story, elicited after police coaching, accords with the crime scene photographs.

- Nixon said he set a fire with some things he found in the M.G., including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died, then threw the burning tonneau cover onto what he thought was her dead body and left the scene.[22] He detailed that he had choked her with a rope she had in her car and that he left it tied around her neck.[23] He said that as he was choking her, he could hear noises like someone "fittin' to drown."[24] But the associate medical examiner who performed the autopsy indicated no signs of a rope, rope marks, or choking: his testimony and his autopsy report both reveal a painstaking examination of the larynx and

19 Confession at 3.850 R. 930–31.

20 Confession at 3.850 R. 959.

21 Confession at 3.850 R. 959–60.

22 Confession at 3.850 R. 932–37.

23 Confession at 3.850 R. 936.

24 Confession at 3.850 R. 937.

adjacent areas which would have revealed any signs of strangulation but found none.[25]

- In his confession, Joe Nixon explained that his reason for killing Jeanne Bickner was that "[she] know me," "[s]he know my name and everything," and he was afraid she was going to tell on him.[26] However, as John Nixon and Wanda Robinson reported Joe's statements to them, he said she was a complete stranger.[27]
- According to Joe's confession, he burned his trousers and shirt at the crime scene because they had blood on them, and he returned to town in his underwear.[28] But Wanda Robinson and John Nixon said that Joe showed them the clothes Joe said he wore when committing the crime;[29] John said they had blood on them

[25] "Well, I did not find any evidence of external or outside injury to the larynx. The larynx is composed of rings of springy cartilage-like material that is fairly easily broken, and all of these were intact. ¶ "There is also a very delicate bone that goes across the larynx just above the region of the Adam's apple . . . . [I]t's a delicate bone that is frequently fractured in this area in the case of injuries. And that bone was intact." R. 1949–50. *See also* Autopsy Report, August 14, 1984, Exhibit F of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 at 3.850 R. 1287.

[26] Confession at 3.850 R. 938. He had originally denied knowing Ms. Bickner (or at least her last name), *id.* at 3.850 R. 918, but then said: "She knows me. She knows my name and everything . . . . Well, she just, or something, up on campus, you know, I be up on Florida State or something. I think she was a teacher or something," *id.* at 3.850 R. 921.

[27] John Nixon told the police that Joe "told me he didn't know the woman at all. . . . She was a complete stranger to him." John Nixon Statement at 3.850 R. 1020. Wanda Robinson concurred: "I asked him who was it [sic] and he said he didn't know." Robinson statement at 3.850 R. 1073.

[28] Confession at 3.850 R. 954–56.

[29] Joint Statement at 3.850 R. 970–71, 973–74; John Nixon Statement at 3.850 R. 1001–02, 1017; John Nixon Deposition at 3.850 R. 1030, 1043; Robinson Statement at 3.850 R. 1076–78; Robinson Deposition at 3.850 R. 1114, 1115–16.

and that he, John, had thrown Joe's blood-stained shirt in the garbage can (where, he asserted, it still was at the time of John's statement to the police), while Joe "took the pants with him."[30]

- There are indications in Wanda Robinson's deposition that she had originally considered John Nixon a likely suspect in the Jeanne Bickner murder—whether in addition to Joe or instead of Joe is unclear[31]—and that the police discouraged her from taking that line.[32] These indications become the more troubling in the light of deposition testimony that Wanda gave in a subsequent civil action brought by Jeanne Bickner's estate against the Governor's Square Mall. She testified that, a year before the Bickner murder, John Nixon had kidnapped her from the Mall by beating her, choking her and throwing her into a car—a procedure very much like the abduction of Jeanne Bicker under any account of the latter, except that John had accomplished it early in the morning, before the mall stores opened.[33] Several months before Joe Nixon's trial, Robinson said, John Nixon again abducted her in a

[30] Joint Statement at 3.850 R. 970–71.

[31] Robinson Deposition at 3.850 R. 1155: "And I was telling him [Detective Paul Phillips] like, 'How do you know John didn't have anything to do with killing this woman?' And, 'You've got Joe in jail, why don't you put John in jail?'"

[32] Robinson Deposition at 3.850 R. 1155–56: "And he [Detective Phillips] said, 'Wanda, you talking crazy. You need to shut up. You know John couldn't have killed the woman because John was with you,' you know, and all of that. Which John was with me that Saturday and that Sunday. ¶ And he just told me, you know, 'You are not supposed to be talking about the case. So, just drop it, you know. Go ahead with your life.'"

[33] *See* Deposition of Wanda Huggins McKinney in *Roberts v. Governor's Square, Inc.*, Appendix to Initial Brief of Appellant and Amended Petition for Writ of Habeas Corpus in the Florida Supreme Court below, Tab 34 at FA. 393–404, 411–15.

similar fashion.[34] In all, John had abducted and assaulted her four times,[35] driving her around in a car and beating her on three of these occasions.[36] Robinson said that she always called the police or the sheriff about the abductions but they wouldn't do anything about it because John was a snitch;[37] Wanda learned he was a snitch after he snitched on Joe.[38]

SUMMARY OF ARGUMENT

This is not a case about a lawyer's decision to concede guilt in order to preserve credibility with the jury at sentencing. It is a case about a lawyer's decision to adopt that tactic and to implement it in the client's absence, without adequately consulting the client. When the lawyer proceeded in this manner—failing to take the necessary steps to protect the client's interest in deciding for himself whether to exercise or forgo his constitutional right to hold the prosecution to its burden of proof beyond a reasonable doubt—counsel not only subverted that right but fatally undermined the adversary structure of the trial process.

First, counsel's unilateral concession of guilt was no different than a guilty plea in any material respect. A solid line of precedent in this Court, through and including *Roe v. Flores-Ortega* supports the propositions that (1) the accused, not defense counsel, controls the decision whether to contest or concede guilt; (2) counsel has the duty to make a reasonable effort to ascertain his client's wishes in that regard and cannot unilaterally elect to

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[34] *Id.* at 404.

[35] *Id.* at 393–94, 396, 400.

[36] *Id.* at 391, 406, 416–21.

[37] *Id.* at. 406–10.

[38] *Id.* at. 409.

forgo his client's right to a Due Process trial upon the client's plea of not guilty; and (3) if that duty is breached, the client is entitled to postconviction relief upon showing a reasonable probability that he would have chosen to hold the prosecution to its burden of proof. Under the circumstances of this case—involving a client tried *in absentia*—the consultation was inadequate, the client's choice of plea was undermined, and there is more than the requisite showing that the client would not have elected to concede guilt if his wishes had been adequately ascertained and respected.

Second, the effective performance of capital defense counsel benefits not just the accused, but the justice system as a whole, including all appellate courts. To perform effectively, defense counsel must "require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if the defense may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656–57 (footnote omitted). When the defense lawyer in this case decided to assist the prosecution in obtaining Mr. Nixon's conviction without Mr. Nixon's consent—whatever counsel's good intentions and however "reasonable" his strategy—the trial lost its adversarial character and Mr. Nixon was deprived of the "Assistance of Counsel for his defence."

(This is a different claim and presents a wholly different issue than the *ineffective*-assistance-of-counsel claim that Nixon presented *in the alternative* in his motion for postconviction relief. That *Strickland* issue was reserved by the Florida Supreme Court; it remains evidentially undeveloped on this record; and the efforts of the State

and its *amici* to conflate it with the issues on which the Florida Supreme Court below granted Nixon relief—and which this Court has granted *certiorari* to review—are quite improper.)

ARGUMENT

Introduction: Putting Spurious Issues Aside

Florida and its *amici* address their briefs to issues that this case does not present. They start from the erroneous premise that the Florida Supreme Court held the Sixth Amendment to the Constitution had been violated when Nixon's trial lawyer conceded Nixon's guilt in opening and closing arguments to the jury. From this premise they reason that the question whether counsel's argument violated Nixon's Sixth Amendment rights should be governed by the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Dwelling on the first prong, they urge that counsel's choice of jury arguments did not constitute substandard performance because it was "reasonable"—a tactical election within the range of those that a competent attorney might agree with. Dwelling on the second prong, they urge that Nixon was not prejudiced by the choice. Pertinent to both prongs, they argue extensively that the prosecution's case for guilt was strong.

This entire structure is built upon a fallacious foundation. The Florida Supreme Court did not hold that Nixon's Sixth Amendment rights were violated when his lawyer conceded Nixon's guilt in jury argument. It held that Nixon's Sixth Amendment and Due Process rights were violated when his lawyer *failed to obtain Nixon's consent before* conceding his guilt in jury argument.[39]

[39] *See Nixon II*, 758 So. 2d at 623 ("if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim"; "the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy"; "[a]lthough an attorney has the right to make tactical decisions regarding trial strategy, . . . the determination to plead guilty or not guilty is a matter left completely to the defendant"); *id.* at 625 ("Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course."); *id.* at 624 ("Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial.").

The Florida Supreme Court did not decide whether counsel's jury argument was "reasonable" or whether it was prejudicial to Nixon. It did not do so because it did not reach Nixon's claims of ineffective assistance under *Strickland v. Washington*, including his *Strickland* claim based on counsel's concession of guilt. In its first postconviction decision in Nixon's case, in 2000, the Florida Supreme Court reserved decision on his *Strickland* claims.[40] It held that "[b]ecause counsel's comments were the functional equivalent of a guilty plea," Nixon was entitled to an evidentiary hearing on the question whether "there was . . . an affirmative, explicit acceptance by Nixon of counsel's strategy" (*Nixon II*, 758 So. 2d at 624), and it remanded for such a hearing. On the remand, the hearing was limited to that specific issue.[41] On the second postconviction appeal,

[40] *See Nixon III*, 857 So. 2d at 175 n.5: "This Court [in *Nixon II*] declined to address the remaining issues in Nixon's 3.850 appeal." *And see id.* at 172 n.2 (summarizing those issues, including the question raised by Nixon "whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim").

[41] The Circuit Court began the hearing by stating that its "understanding from the [Florida] Supreme Court's opinion is that we are here to determine one issue and one issue only." JA. 434. It defined that issue as whether "Mr. Nixon did not give . . . his attorney consent to, as the Supreme Court has framed it, enter a guilty plea or to agree to allow his attorney to undertake a trial strategy in which guilt would be determined." *Ibid.* Nixon's postconviction counsel affirmed

resulting in the decision now before this Court for review, the Florida Supreme Court again found it unnecessary to

that that was their understanding. JA. 434–35. Counsel for the State asserted that he wanted to develop a sufficiently full record so that he could "preserve our legal issue" (JA. 437) as to whether the Florida Supreme Court had wrongly applied *Cronic* rather than *Strickland* to Nixon's claim concerning his trial lawyer's concession of guilt. JA. 435–37. The court replied "although the issue is pretty much narrowed by the Supreme Court's opinion, I think in terms of developing a record it would be appropriate to inquire maybe a little beyond the bounds of that specific issue of [Nixon's] agreement [to counsel's concession]." JA. 437–38. Nixon's attorneys pointed out that they had raised separate *Cronic* and *Strickland* claims, and that the Supreme Court's remand had to do only with the *Cronic* claim. JA. 438. The court inquired "what ineffectiveness claims you . . . would argue should not be addressed." JA. 439. Nixon's attorneys replied that "[t]here are guilt phase ineffective assistance claims under Strickland which would, of course, require the two-prong showing of inadequacy and prejudice" (JA. 439), and asserted: "if we are going to have a hearing on that, Your Honor first of all we ought to have had notice of that. And second of all, one day would never do it. If we knew that that was the case, we would have asked Your Honor for much more time. This is a total surprise to use [sic] that the State wants to inquire into this stuff." *Ibid.* State's counsel explained that his aim was solely to preserve the issue "whether Cronic applied or whether Strickland applied" and that the State had a "legal right to develop a correct record." JA. 439-40. Nixon's attorneys replied that "if anybody is going to be denied their legal right if you proceed according to their [the State's] plan [to expand the hearing beyond the *Cronic* issue], it will be our denial of a legal right to develop a full evidentiary hearing on our Strickland claim." JA. 440; *see also* JA. 440–42. State's counsel clarified that "I am not talking about whether you would consider it ineffective in his failure to present a competency defense or anything like that. I am talking about, develop what Mr. Corin did leading up to the decision that he came to to [sic] not litigate the guilt issue and the facts and circumstances surrounding that decision. ¶ Because, otherwise, I am going to get up there, and I'm not going to have any evidence to present that the issue was to be decided under a Strickland prejudice test rather than Cronic." JA. 443. The court observed that "perhaps we are making a little mountain out of a mole hill here. What I am hearing from . . . [State's counsel] is perhaps some latitude in development of the record on this claim as I've articulated. ¶ And

reach any other issue.[42] The only issue it decided, and the only issue now before this Court, is whether trial counsel's failure to obtain Nixon's consent before conceding in opening and closing jury argument that his client was guilty of capital murder constituted a *per se* violation of Nixon's Sixth and Fourteenth Amendment rights.[43]

I, certainly, will provide the State with that opportunity. I want to fully provide—or to provide a full record and as complete as possible in regard to everything having to do with the development of the trial strategy and the discussions that occurred there between Mr. Corin [Nixon's trial counsel] and Mr. Nixon." JA. 443. The court concluded that "I think we are all in agreement at this point, and I think we are safe to proceed" (JA. 444); and the hearing went forward on that footing.

[42] "The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in *Nixon II*." *Nixon III*, 857 So. 2d at 175.

[43] The Florida Supreme Court found that Nixon had been denied two related rights protected by the federal constitutional guarantee of due process: the right to a trial on his plea of not guilty, and the right to have counsel's assistance in holding the prosecution to its burden of proof once Nixon had elected to enter that plea:

> "In addition to the right to effective assistance of counsel, 'the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Nixon II*, 758 So. 2d at 621.)
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> "[T]he determination to plead guilty or not guilty is a matter left completely to the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751. . . (1983) . . . ; *Brookhart v. Janis*, 384 U.S. 1 . . . (1966) (stating that . . . the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a 'not guilty' plea. By pleading 'not guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. . . . 'Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea.'" (*Nixon II*, 758 So. 2d at 623–24.)

Florida's and its *amici*'s efforts to import a *Strickland* issue into the case are distracting, procedurally inapt, and grossly unfair. When Mr. Nixon's state postconviction motion was originally filed, his postconviction counsel *did* proceed on a *Strickland* theory *cast in the alternative* to the theory on which the Florida Supreme Court subsequently gave him relief.[44] Under their *Strickland* theory,

> "[T]his Court has stated that '[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' . . . ¶ Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." (*Nixon II*, 758 So. 2d at 624.)
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> "In *Nixon II*, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy." (*Nixon III*, 857 So. 2d at 176.)

[44] Nixon's Motion to Vacate pleaded the *Cronic-Boykin* claim on which the Florida Supreme Court below later ruled in his favor as Claim II ("Defense Counsel's Concession of Guilt Without an Express Waiver by Mr. Nixon on the Record Constituted Ineffective Assistance of Counsel *Per Se* Under *United States v. Cronic*") at 3.850 R. 444–58. (The *Boykin* aspect of the claim appears at 3.850 R. 453–54.) The Motion pleaded an alternative *Strickland* claim based on the same concession in Claim V.B ("Mr. Nixon was Deprived of the Effective Assistance of Counsel when His Lawyer Conceded his Guilt to the Jury") at 3.850 R. 468–70. The *Strickland* version of the claim was one of 22 specifications of trial counsel's ineffective assistance at the guilt stage of the trial (3.850 R. 465–517) which the petition urged be considered as mutually compounding (3.850 R. 465) and on which it requested an evidentiary hearing (3.850 R. 465, 517). The petition twice recited that the *Cronic-Boykin* and *Strickland* versions of the claim were alternative and independent (3.850 R. 458, 470), and it explicitly stated that if the court did not find the *Cronic-Boykin* version of the claim established on the face of the trial record, Nixon was entitled to an evidentiary hearing on the *Strickland* version "at which Mr. Nixon will establish that under *Strickland*, counsel was constitutionally ineffective and that Mr. Nixon was substantially prejudiced thereby." 3.850 R. 458.

they sought a hearing at which they could show that the appearance of Nixon's guilt and of the "strong prosecution case" so prominently featured in the briefs of Florida and its *amici* are artifacts of a record distorted and impoverished *because* trial counsel chose not to contest the prosecution's case of guilt and its underlying factual scenario depicting Joe Elton Nixon as the lone perpetrator of the murder of Jeanne Bickner. The original state postconviction judge denied them a hearing on their *Strickland* claims;[45] they appealed that denial to the Florida Supreme Court; and their assertion of a right to be heard on facts relevant to any proper *Strickland* adjudication remains unresolved by the Florida Supreme Court because that Court invalidated Nixon's conviction on a theory which made these facts irrelevant.[46]

For the State and its supporters now to call for a *Strickland* analysis based on the proposition that this is a "capital case in which the evidence of guilt was overwhelming" (Pet. Br. at 21) is disingenuous at best. And the maneuver is made still more devious by talking about the evidence of "guilt" being "overwhelming" *without* noting that the same evidence irresistibly cried out for a death sentence *if* Nixon did commit the crime in the way the prosecution

[45] Order dated October 22, 1997. JA. 378–92.

[46] *See Nixon II*, 758 So. 2d at 619 n.1, describing the claims raised by Nixon on appeal and left unresolved, including "(1) the circuit court denied him a full and fair hearing on his ineffective assistance claim"; *Nixon III*, 857 So. 2d at 173 n.2 (same).

contended and his lawyer conceded, for surely this is a consideration relevant to *Strickland* analysis that Nixon would be entitled to argue in the first instance to Florida judges familiar with the sentencing penchants of Florida juries if his case were reconfigured so that his alternative *Strickland* theory was turned into his *sole* constitutional claim, as the State and its *amici* now seek to do.

Inasmuch as this Court has repeatedly advised the Bar that "we do not decide in the first instance issues not decided below" (*Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)), Mr. Nixon's brief will respect that limitation. *See, e.g., Smith v. Robbins*, 528 U.S. 259, 284–85 (2000) (remanding for the lower court to adjudicate an ineffective-assistance-of-counsel claim under *Strickland* standards after holding that that court had erred in employing a different standard); and *e.g., Gilbert v. Homar*, 520 U.S. 924, 935–36 (1997); *Wright v. West*, 505 U.S. 277, 297 (1992) (plurality opinion of Justice Thomas). In Part I below, we discuss the correctness of the Florida Supreme Court's holding that Mr. Nixon was denied the right to stand trial upon his plea of not guilty.[47] In Part II, we discuss the correctness of its holding that he was also denied the Sixth Amendment right to the assistance of counsel, because his lawyer "'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.'"[48]

[47] *See supra* note 43; *and see Nixon III*, 857 So. 2d at 174, 176.

[48] *Nixon II*, 758 So. 2d at 622, quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984); *see Nixon III*, 857 So. 2d at 174.

I. The Florida Supreme Court Correctly Held that Mr. Nixon Was Denied His Right to Contest His Guilt at a Trial Conducted in Accordance with His Plea of Not Guilty

Four principal precedents of this Court combine to establish that Mr. Nixon enjoys the constitutional right vindicated by the Florida Supreme Court in this case: the right to a trial conducted in a manner consistent with his plea of not guilty, unless he personally elects to forgo such a trial. Three of those precedents—*Jones v. Barnes*, 463 U.S. 745 (1983), *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1 (1966)—were relied upon by the Florida court to inform its decision. *Nixon II*, 758 So. 2d at 623–24. The fourth—*Roe v. Flores-Ortega*, 528 U.S. 470 (2000)—was handed down about a month after the decision in *Nixon II* and fully confirms the Florida court's reading of the earlier precedents.

In *Jones v. Barnes* the Court's opinion by Chief Justice Burger recognized that a criminal defendant, and not his or her attorney, "has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." 463 U.S. at 751; *see also id.* at 753 n.6. The Court had earlier so held implicitly, in the case of a guilty plea;[49] *Jones* made the rule explicit; and

[49] *See Henderson v. Morgan*, 426 U.S. 637 (1976), holding that a guilty plea entered by a state criminal defendant who was represented by counsel must be set aside upon a showing that the defendant had been misinformed regarding the *mens rea* element of the offense charged. The Court did not suggest that *counsel* was misinformed, that counsel's decision to broker the plea was strategically ill-advised or unreasonable, or that counsel had performed ineffectively in any other way than by failing to assure that his client personally made an intelligent and understanding choice to plead guilty. Plainly, *Henderson* was bottomed on the principle that the choice was the defendant's alone, not counsel's.

Jones has since been regarded by the Court as authoritative on the point. *See, e.g., Roe*, 528 U.S. at 577; *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987).

Boykin, of course, stands for the proposition that a guilty plea is not constitutionally valid unless the record affirmatively shows that the defendant personally made an understanding and voluntary waiver of the right to a Due Process trial, with knowledge of the rights s/he was putatively waiving. *Boykin*, 395 U.S. at 243–44. That, too, remains unquestioned constitutional doctrine today. *See, e.g., United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2341 n.10 (2004).

The teaching of *Brookhart* is that the application of these principles is not limited to technical, formal pleas of guilty, but extends to procedures that are the functional equivalent of a guilty plea in that they involve a surrender of the right to contest the prosecution's factual case on the issue of guilt or innocence. In *Brookhart*, a defendant's lawyer agreed to a locally recognized procedure known as a "prima facie trial." This Court held that that procedure—under which the defendant could not be convicted unless the prosecution presented sufficient evidence to support a finding of guilt but in which the defendant refrained from challenging the prosecution's case in any way—could not constitutionally be used to convict a defendant who had not personally assented to it. Defense counsel's assent—wise or unwise, reasonable or unreasonable, harmful or helpful to the defendant—was insufficient.

> "By agreeing to this truncated kind of trial—if trial it could be called—we can assume that the lawyer knowingly agreed that the State need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses. The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. His desire not to agree to such a trial is shown by the fact that immediately after the judge accurately stated that in a prima facie case the defendant 'in effect admits his guilt,' Brookhart personally interjected his statement that 'I would like to point out in no way am I pleading guilty to this charge.' Although he expressly waived his right to a jury trial, he never, at any time, either explicitly or implicitly, pleaded guilty. His emphatic statement to the judge that 'in no way am I pleading guilty' negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty. Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." (*Brookhart*, 384 U.S. at 6–7.)

This holding of the Court, no less than those in *Jones v. Barnes* and *Boykin*, has stood the test of time. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988); *New York v. Hill*, 528 U.S. 110, 114 (2000).

Contemporaneously with the Florida Supreme Court's reliance on these precedents below, this Court recon-

firmed their core principles and explored the resulting obligations of counsel in *Roe v. Flores-Ortega*. The *Roe* opinion demonstrates that the Florida Supreme Court framed the inquiry in the present case correctly and that the State of Florida and its *amici* have framed it incorrectly. For, like the Florida Supreme Court, *Roe* focuses *not* upon whether counsel's decision to forgo the exercise of a criminal defendant's right to a trial (or, in *Roe*, an appeal) is unreasonable and prejudicial, but on whether counsel has acted unreasonably and prejudicially in failing to safeguard *the defendant's right to make that decision personally and advisedly*. (The distinct *Strickland* issue, which, as we have noted above, is not now before the Court and would require additional evidentiary development,[50] is whether counsel's *advice* to the defendant to forgo the right was unreasonable and prejudicial. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973).)

In other words, where the sort of basic right identified in *Jones*, *Boykin*, and *Brookhart* is in question, analysis does not proceed by asking whether counsel made a reasonable judgment to abandon the right, but "by first asking a separate, but antecedent, question: whether counsel . . . consulted with the defendant about [exercising that right]." 528 U.S. at 478. "Consultation," as *Roe* uses the term to reflect the teaching of the earlier cases, means not only "advising the defendant about the advantages and disadvantages of" exercising the right in question, but also "making a reasonable effort to discover the defendant's wishes." *Ibid*. This "constitutionally imposed duty to consult with the defendant" arises whenever "there is reason to think either (1) that a rational defendant would want to . . . [exercise the right], or (2) that this particular defendant reasonably demonstrated to counsel that he

[50] *See supra* notes 44–46 and accompanying text.

was interested in . . . [exercising the right]." *Id* at 480. If *either* of these conditions exists and defense counsel has *either* failed to advise the defendant or failed to make "a reasonable effort to discover the defendant's wishes," the defendant is entitled to postconviction relief upon a showing "of prejudice from counsel's deficient performance." *Id*. at 481. The test of prejudice is whether "there is a reasonable probability" that the defendant would have chosen to exercise the right if adequately consulted. *Id*. at 485.

In deciding Mr. Nixon's case, the Florida Supreme Court did not use the identical terminology that was used in this Court's *Roe* opinion a month later. But its basic analysis was no different than *Roe*'s. It started from the same premise as *Roe*—the recognition in *Jones v. Barnes* that "'the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Nixon II*, 758 So. 2d at 623. *See also Roe*, 528 U.S. at 577 (reading *Jones* as holding that the "'accused has ultimate authority to make [the] fundamental decision whether to take an appeal'"). That starting point led the Florida Supreme Court, like *Roe*, to concentrate on whether the defendant's lawyer had done an adequate job of ascertaining the defendant's wishes with regard to the fundamental decision in question—which, in Nixon's case, was the decision whether to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." *Nixon II*, 758 So. 2d at 625. *See also id*. at 623. Nixon had displayed an interest in contesting the prosecution's case for a conviction of first-degree murder when, "[a]t his arraignment, . . . [he] entered a 'not guilty' plea." *Ibid*. "By pleading 'not

guilty,' Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged." *Ibid. See also id.* at 623. In *Roe*'s terminology, Nixon thereby "reasonably demonstrated to counsel that he was interested in" putting the prosecution to its proof. *Roe*, 528 U.S. at 480. Nixon's not-guilty plea, his manifest rage at learning about counsel's concession of guilt (*see* note 5 above), and the manifest availability of grounds for attacking the prosecution's theory of the case (*see* pages 13–22 above) are more than sufficient to demonstrate that, for purposes of *Roe*'s prejudice component, "'there is a reasonable probability that . . . [Nixon] would have insisted on going to trial'" if his wishes had been consulted. 528 U.S. at 485. Within *Roe's* analytic framework, then, the only real controversial issue was whether Nixon's counsel had failed to make "a reasonable effort to discover the defendant's wishes," *Roe*, 528 U.S. at 478; and the Florida Supreme Court concluded that he had, because Nixon's "[s]ilent acquiescence is not enough." *Nixon II*, 758 So. 2d at 624.

> "There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy. *Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to 'hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt.' Nixon II*, 758 So. 2d at 625 (emphasis added). Since we held in *Nixon II* that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial." (*Nixon III*, 857 So. 2d at 176.)

In many cases—and certainly in the ordinary case, "where the circumstances are not 'exceptional,'" *Brookhart*, 384 U.S. at 7—the Florida Supreme Court's ruling that "silent acquiescence is not sufficient" would probably demand too much of counsel under *Roe*'s subsequently announced standard that counsel's duty is to make "a reasonable effort to discover the defendant's wishes." *Roe*, 528 U.S. at 478. But *Roe* itself reminds us repeatedly that "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.* at 477. *See also id.* at 478, 480. Nixon's own case is one in which the circumstances *are* exceptional; and in this exceptional case at least, the Florida Supreme Court's demand for more than "silent acquiescence" is entirely consistent with *Roe*.

Nixon was tried *in absentia*. In the ordinary case, where a criminal defendant is present with counsel throughout the trial proceedings, it is commonplace and may be perfectly proper to infer from his or her attendance without objections that s/he has been sufficiently consulted and assents to counsel's basic manner of conducting the defense. Under these circumstances, silent acquiescence may well be sufficient. But when the defendant is absent from the courtroom at the time counsel proceeds to "make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, [or waive the defendant's right to] testify

in his or her own behalf,"[51] the defendant's assent to counsel's decision cannot properly be assumed or inferred. And this is so whether or not the court's determination to hold the trial in the defendant's absence was legally permissible, as we must assume at the present stage of this case that it was (although this, too, is an issue raised by Mr. Nixon's state postconviction petition that remains unresolved by the Florida Supreme Court).[52] Surely if, despite the propriety of Nixon's trial *in absentia* on his plea of not guilty, counsel had announced at the conclusion of jury selection that he was changing Mr. Nixon's plea to guilty and consenting to the entry of a judgment convicting Mr. Nixon of capital murder, this Court's precedents from *Jones v. Barnes* through *Roe v. Flores-Ortega* would not countenance the entry of such a judgment of conviction without bringing Mr. Nixon into court and inquiring whether the decision to change his plea was one that he assented to.[53]

The present case stands on no different footing: counsel's concession of Nixon's guilt in opening and closing statements made without Nixon's express assent and in his absence falls squarely within the condemnation of these precedents and particularly the ruling in *Brookhart*

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[51] *Jones*, 463 U.S. at 751.

[52] The Florida Supreme Court held on Nixon's direct appeal that the trial court had properly found that Nixon consented to be tried *in absentia*. *Nixon I*, 572 So. 2d at 1341–42. But Nixon's postconviction motion alleged that that finding was made without a constitutionally required inquiry into Nixon's mental competence (Motion to Vacate at 3.850 R. 419–40), and this issue is among those that the Florida Supreme Court left undecided when it vacated Nixon's conviction on the ground of his lawyer's unauthorized concession of guilt. *See Nixon II*, 758 So. 2d at 619 n.1, item (2); *Nixon III*, 857 So. 2d at 173 n.2, item (2).

[53] In fact, of course, Nixon expressed his lack of assent in the only way he knew how. *See supra* note 5.

that "the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." *Brookhart*, 384 U.S. at 7.

Florida and its *amici* argue, however, that defense counsel's concession of the defendant's guilt in jury argument is different from a formal plea of guilty in a number of technical and theoretical respects, the foremost being that such a concession does "not relieve the State of its burden to present evidence or to prove guilt beyond a reasonable doubt": "the State was obliged to (and did) present evidence that was not merely legally sufficient to convict, but also sufficiently credible and weighty to convince the jury of Nixon's guilt beyond a reasonable doubt." (Pet. Br. at 30). With respect, these arguments reek of the lamp. No one having the least experience with real juries in real courtrooms could seriously imagine that any jury will acquit a defendant after his or her lawyer has told it that s/he is guilty—let alone if his or her lawyer, like Nixon's lawyer, tells the jury that s/he is guilty in both opening and closing argument, presents no evidence, and does not cross-examine any of the state's witnesses, except to ask a few perfunctory, clarifying questions. It is true, to be sure, that despite defense counsel's concession of guilt, the trial *judge* might direct a verdict of acquittal if the prosecution failed to present sufficient evidence to support a verdict of guilty. But that, of course, was equally the case—indeed, it was the whole point of the "prima facie trial" procedure—in *Brookhart v. Janis*; and this Court nonetheless invalidated Brookhart's conviction on the ground that his lawyer could not, without Brookhart's personal assent, constitutionally agree to a form of trial "which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty." *Brookhart*, 384 U.S. at 7.

Here the Florida Supreme Court similarly found that "counsel's comments were the functional equivalent of a guilty plea." *Nixon II*, 758 So. 2d at 624. *See also Nixon III*, 857 So. 2d at 176. Its invalidation of Nixon's conviction on the further finding that "[t]here is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy," *ibid.*, was therefore thoroughly in keeping with *Brookhart* and this Court's other precedents from *Jones* through *Flores-Ortega*.

That is a sufficient ground for affirmance of the judgment below. But an additional consideration bolsters the case for affirmance. The decision of the Florida Supreme Court that the rule it announced in *Nixon II* and enforced in *Nixon III* is required to protect the federal constitutional right of Florida criminal defendants to make "the ultimate choice" whether or not to "hold the State to its burden of proof by clearly articulating to the jury or factfinder that the State must establish each element of the crime charged . . . beyond a reasonable doubt"[54] deserves this Court's respect.

Because the right at issue *is* federal, this Court has undoubted authority to define its contours. But that is not to say that the Court should supervise every decision by a state court regarding the ancillary procedures needed to protect the right under the conditions of criminal practice that exist in that State's courts. A State's highest court is more familiar with those conditions—with the prevalent practices and penchants of the state's criminal bar, its trial judges, and its juries, and with the practicalities and costs of recourse to appellate review for correction of problems at the trial level—than this Court can possibly be. Given that familiarity, it may see the need to insist on strict rules for the way in which criminal attorneys perform the duty of consultation recognized in

[54] *Nixon II*, 758 So. 2d at 625.

Roe—the duty of "advising the defendant about the advantages and disadvantages of . . . [exercising a particular right] and making a reasonable effort to discover the defendant's wishes"[55]—that go beyond the minimum requirements which this Court is prepared to impose on all of the 50 States.[56] Several individual States' highest courts, in addition to Florida's, have adopted rules requiring a defendant's consent before defense counsel may concede his or her guilt in jury argument.[57] These requirements differ in stringency and in the means by which they are enforced,[58] although all of them were ini-

[55] *Roe*, 528 U.S. at 478.

[56] The Florida Supreme Court, for example, saw fit to enforce *Boykin v. Alabama* in the Florida courts by a rigorous requirement that a court accepting a guilty plea must "carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). In *Nixon II*, it referenced *Koenig* as well as *Boykin* in insisting upon "an affirmative, explicit acceptance by Nixon of counsel's strategy" as the precondition for counsel's concession of Nixon's guilt and in announcing, "in order to avoid similar problems in the future," that "if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy." *See* 758 So. 2d at 624–25. The *Nixon II* protocols represent a studied judgment by the Florida Supreme Court regarding the most effective procedure for respecting federal constitutional concerns and reducing the costs of federal constitutional adjudication in a way that is minimally disruptive of Florida criminal trial practice. Though firmly grounded in this Court's precedents, they are not driven solely by those precedents but rather represent an effort to integrate the principles of federal case law into the framework of Florida practice, performed by the court uniquely qualified to do this.

[57] *See People v. Hattery*, 109 Ill. 2d 449, 488 N.E.2d 513 (1985); *State v. Carter*, 270 Kan. 426 14 P.3d 1138 (2000); *State v. Wiplinger*, 343 N.W.2d 858 (Minn.1984); *State v. Anaya*, 134 N.H. 346, 592 A.2d 1142 (1991); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

[58] *Compare Dukes v. State*, 621 N.W.2d 246 (Minn. 2001) (defendant's consent required where counsel conceded guilt on some counts

tially derived from federal constitutional sources. We respectfully suggest that this is as it should be in a federal system, and that profound concerns of federalism call for this Court's giving state courts a reasonable amount of leeway in crafting local procedures for the most efficient protection of federal constitutional rights within their own judicial systems. *Cf. Reitman v. Mulkey*, 387 U.S. 369 (1967). The Court has frequently recognized that there is a vital role for the state judiciary in implementing federal constitutional guarantees.[59] It is hardly consistent with that role to crimp their freedom to blend their special understanding of local conditions with a sound appreciation of the federal guarantees that they are seeking to preserve.

II. The Florida Supreme Court Correctly Resolved the *Cronic* Aspect of Mr. Nixon's Claim of Ineffective Assistance

Cronic and *Strickland*, which were decided on the same day, share a common vision: while the immediate beneficiary of effective attorney performance is the client, the intended third-party beneficiary is the criminal justice system. *See Cronic*, 466 U.S. at 655–57 (the "underlying purpose" of the guarantee of effective assistance of counsel is to insure that the adversary process functions to illuminate truth and avert injustice).[60]

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of a multi-count indictment comprising elements of crimes charged in other counts), *with Griffin v. State*, 866 So. 2d 1 (Fla. 2003) (*contra*); *compare Harbison*, *supra* note 57 (consent required where counsel conceded guilt of a lesser included offense) *with Atwater v. State*, 788 So. 2d 223 (Fla. 2001) (*contra*).

[59] See, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 732 (1991), and cases cited.

[60] *See also* Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989) ("All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.")

Mr. Corin's unilateral decision to concede Mr. Nixon's guilt not only deprived his client of the assistance of counsel to which Nixon was entitled[61] but also infected the trial with an irremediable structural error. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (an erroneous reasonable doubt instruction can never be harmless error no matter how overwhelming the evidence against the defendant because the jury's verdict of guilt stands upon a structurally infirm foundation); *Johnson v. Zerbst*, 304 U.S. 458, 465–68 (1938) (the assistance of counsel is an indispensable structural component of a criminal proceeding). As the *Cronic* Court explained:

> "The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if the defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.[62] But if the process loses its

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[61] *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Commentary to Guideline 10.10.1 ("The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt" [citing *Nixon II*]) (rev. ed. 2003).

[62] The Court's footnote numbered 19 at this point reads in part: "Of course the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. *At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt*" [citations omitted] (emphasis added).

character as a confrontation between adversaries, the constitutional guarantee is violated." (*Cronic*, 466 U.S. 656–57; footnote omitted.)

The difference between the two situations is illustrated by *Bell v. Cone*, 535 U.S. 685 (2002).[63] In that case (which this Court was reviewing under the deferential standards of 28 U.S.C. § 2254 (d) (1)), counsel at the penalty phase of a capital trial gave an opening statement in which he "called the jury's attention to the mitigating evidence" and "urged the jury that there was good reason for preserving his client's life." *Id.* at 691. He conducted a productive cross-examination of the state's witnesses (eliciting that his client had been awarded a Bronze Star in Vietnam), and successfully excluded some of the prosecution's evidence. Defense counsel then "waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal." *Id.* at 691–92.

On federal habeas corpus review, the Sixth Circuit held that *Cronic* had been violated because "counsel, by not asking for mercy after the prosecutor's final argument, did not subject the State's call for the death penalty to meaningful adversarial testing." *Id.* at 693.

Not surprisingly, this Court reversed, holding that *Strickland* rather than *Cronic* governed, because counsel had not "entirely" failed to "subject the prosecution's case to meaningful adversarial testing." Since the defendant's claim was "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but rather that his counsel failed to do so at specific points," *Cronic* did not apply. *Id.* at 697.

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[63] The Florida Supreme Court had no occasion to discuss this case because it was decided after *Nixon II*, which established the legal rules that were applied as the law of the case in *Nixon III*.

The present case, in contrast, falls precisely at the core of *Cronic*. By conceding guilt in both opening and closing arguments and failing to challenge the prosecution's case in any way, counsel failed, without authorization from his client, "to oppose the prosecution throughout the [guilt] proceeding as a whole." *Id.* The result was to undermine "the basic fairness of the trial itself." *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (erroneous determination that the defendant was competent to stand trial would result in a fundamentally unfair proceeding in violation of *Cronic* because it would undermine the defendant's right to make decisions reserved to him, such as whether to plead guilty, as well as the ones he should make with the assistance of counsel).

Regardless of what the jury may have been told by the prosecutor or the judge about burdens of proof, once defense counsel elected to abandon the duty he owed his client to "hold the prosecution to its heavy burden of proof beyond reasonable doubt," *Cronic*, 466 U.S. at 656 n.19, the process lost one of its key structural guarantees. Nothing done by any other actor—nor any amount of prosecution evidence—could cure that loss or warrant confidence that it did not suffice to seal Nixon's conviction. For, whether or not the prosecution's case would otherwise have been convincing to the jurors, they were necessarily bound to find it ample when defense counsel himself told them that it was, when he repeated that Nixon's guilt beyond a reasonable doubt was not contestable, and when he vouched for that conclusion demonstratively by declining to contest the prosecution's case in any fashion or particular.

Where defense counsel decides without the client's consent to abandon the ship that the client should be navigating and instead to ally himself with the forces attacking the ship, a two-sided contest has become one

sided. That is a situation that cannot be salvaged by any amount of *post hoc* analysis of the resulting flawed record; the error itself precludes its cure. Thus, notwithstanding the State's solicitous concern for Nixon's rights (Pet. Br. at 28), the rule adopted by the Florida Supreme Court requiring the defendant's explicit consent before counsel can concede guilt makes perfect sense in terms of the justice system. A requirement that defense counsel hold the prosecution to its burden of proof unless the client directs the contrary implements *Cronic* by maximizing the chances that "a true adversarial criminal trial"—with its concomitant "testing envisioned by the Sixth Amendment"—will take place, to the benefit of all concerned, through and including the reviewing Justices of this Court. *See Cronic*, 466 U.S. at 656. *See also* note 60 above and accompanying text.

Moreover, even if the structural defect of a one-sided, non-adversarial trial could be retrospectively repaired, the costs of the effort would outweigh the benefits. What the State and its *amici* refer to disparagingly as a "per se rule" is, in fact, a rule of judicial economy and good sense.

The *Cronic* Court explained that its recognition of a few specific situations warranting reversal as a matter of law was designed to identify "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. *See also Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (reiterating this rationale for *Cronic*). That rationale is applicable here.

As we have shown at pages 13–22,[64] the prosecution's theory of Nixon's guilt was far from uncontestable. Only

[64] In deciding *Nixon II*, the Florida Supreme Court had before it a substantially similar analysis of the record. *See* Initial Brief of Appellant, filed June 5, 1998 at 2–28.

defense counsel's failure to contest it made it appear so. Under these circumstances, Mr. Nixon almost certainly suffered some substantial degree of harm whose extent is not ascertainable from the present record and is not worth the effort of attempting to reconstruct precisely. Without his consent, Nixon was deprived of counsel acting on his behalf to ask questions about the prosecution's case that plainly needed to be asked; and the Florida Supreme Court was on solid legal ground in declining under *Cronic* to extend the already-elongated process of postconviction review through yet further rounds of evidentiary inquiry.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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